

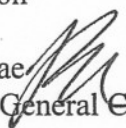


Department of Energy

Washington, DC 20585

MAY 24, 2005

MEMORANDUM TO: Distribution

FROM: Ben McRae 
Assistant General Counsel for Civilian Nuclear Programs

SUBJECT: Refresher Guidance re Licensing Support Network
Relevance and Privilege Designations

Pursuant to prior guidance, personnel and contracting organizations working on matters related to the Yucca Mountain project are required to submit potentially relevant documents on a monthly basis to the Department of Energy's Automated Litigation Support (ALS) Contractor, currently CACI, Inc., for potential inclusion on the NRC's Licensing Support Network. They also are required to retain certain other documents for potential use in the licensing proceeding in connection with derivative discovery. Attached is refresher guidance from the Department's Office of General Counsel regarding those obligations.

You should distribute this guidance to all personnel in your organization working on the Yucca Mountain project. You also should provide this guidance to all of your contractors working on matters pertaining to Yucca Mountain, with instructions to them to distribute the guidance to their personnel and subcontractors.

While you should read and follow the entire guidance as a whole, the following highlights are noted:

- The program identifies through separate procedures potentially relevant documents that are submitted to the OCRWM's Records Processing Center (RPC). Thus, you do not need to submit to the ALS Contractor documents that have been submitted or will be submitted to the RPC even if they would be considered potentially relevant under this guidance. [Note: LSN requirements are separate from federal recordkeeping requirements.]



- Your obligation to identify and submit documents to the ALS Contractor applies to emails that you send or receive, regardless of whether the e-mail system is operated by OCRWM, DOE or another entity. This includes emails between an employee of one national laboratory and a co-employee as well as emails among employees of different national laboratories. It also includes emails among contractor and/or subcontractor employees. The standard for relevance of emails is the same as for other documents (that is, any material or information that might have any possible bearing whatsoever on the licensing of a repository at the Yucca Mountain site). The standard for retaining documents for potential discovery applies equally to emails as well.
- This guidance makes two changes regarding the retention of documents that lessen the burden of the retention obligation. First, you do not need to retain multiple copies of documents. It is sufficient to retain only one copy (assuming that your other copies do not have any unique, relevant marginalia). Second, you do not need to retain copies of documents that you submit to the RPC or that you print from the Records Information System or the LSN (unless you add relevant marginalia to the document).
- The guidance regarding which documents to mark as privileged applies to all Yucca Mountain project documents you create, regardless of whether you submit them to the RPC or the ALS Contractor.

If you have a question about this guidance, please contact Martha Crosland (202-586-5793) at the Office of General Counsel.

REFRESHER GUIDANCE RE LICENSING SUPPORT NETWORK RELEVANCE AND PRIVILEGE DESIGNATIONS

I. BACKGROUND

In a memorandum dated May 5, 2003 (Call Memo), the Department of Energy General Counsel gave direction regarding the collection and submittal to the Department's Automated Litigation Support (ALS) Contractor, CACI, Inc., of documents for potential production on the Licensing Support Network (LSN) in connection with the licensing proceeding before the Nuclear Regulatory Commission (NRC) for a geologic repository at Yucca Mountain, Nevada. The May 5, 2003 Call Memo additionally provided direction regarding the retention of certain documents not required to be submitted to the ALS Contractor but that nonetheless need to be retained for possible use in the licensing proceeding in connection with derivative discovery. A December 12, 2003 memorandum from CACI directed the ongoing submittal of documents to be made on a monthly basis. That requirement remains in effect until further notice.

In connection with that document collection effort, the Department of Energy has provided guidance at various times regarding the identification of potentially relevant documents that need to be submitted to the ALS Contractor as well as the identification of documents as privileged. The May 5, 2003 Call Memo provided such guidance. A link on the project intranet to Frequently Asked Questions also has provided such guidance. This memorandum summarizes that guidance to assist your ongoing obligation to submit documents to the ALS Contractor and to retain other documents for potential use in the licensing proceeding. It also provides guidance to users of the OCRWM Lotus Notes email system regarding which emails to mark as relevant and/or privileged through the template provided on that email system.

This guidance addresses the major categories of documents and other issues that project personnel have identified to the Department's Office of General Counsel (OGC) during the document collection effort to date. If you have a question about relevance or privilege not addressed by this guidance, or have a question regarding this guidance, please contact Martha Crosland (202-586-5793) at the OGC.

II. DOCUMENTS REQUIRED TO BE SUBMITTED TO THE ALS CONTRACTOR

Subject to certain exclusions, NRC regulation requires DOE to make "documentary material" electronically available on the LSN as part of the Yucca Mountain licensing proceeding. NRC regulation, at 10 C.F.R. § 2.1001, defines "documentary material" as:

1. "Any information upon which [DOE] intends to rely and/or to cite in support of its position in the proceeding for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to part 60 or 63 of this chapter;"
2. "Any information that is known to, and in the possession of, or developed by [DOE] that is relevant to, but does not support, that information or [DOE's] position;"

3. "All reports and studies prepared by, or on behalf of, [DOE], including all related 'circulated drafts' relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon or cited by [DOE]. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide." A copy of the current version of Regulatory Guide 3.69 is attached to this guidance.

You must submit all documents in your possession, custody or control that qualify as "documentary material" under any of the foregoing three definitions **unless** the document falls into one or more of the categories listed below in paragraphs A-K. This direction applies to all types of documents (e.g., paper, e-mail, electronic, graphic-oriented, etc.). You can submit to the ALS Contractor original documents or, if you prefer, you can submit copies. **NOTE:** You do not have to retain copies of documents that you submit to the ALS Contractor. Also, you may need to retain certain documents that you do not submit to the ALS Contractor for purposes of derivative discovery later in the licensing proceeding. On this latter point, see Section III below.

Any documents (e.g., paper, e-mail, electronic, graphic-oriented, etc) that are potentially relevant to licensing a repository at the Yucca Mountain site that do not fall into one of the exclusion categories below are to be submitted. NRC has defined relevancy in broad terms as having any possible bearing on the licensing proceeding and has made it clear that the relevancy of a document is not dependent on whether or not the document supports the position of a party or whether or not it is relied upon or cited by a party. Any documents regardless of form or characteristic that could have any possible bearing on the licensing of a repository at the Yucca Mountain site are potentially relevant. This includes any document concerning the substance of the license application or any of the underlying technical, engineering or scientific work as well as substantive comments on such work. A comment is substantive if it contains information and is not merely editorial (*i.e.* merely corrects typographical, spelling or grammatical errors or reorders words, sentences or paragraphs) If you are uncertain whether a document qualifies as documentary material or falls into one of the exclusion categories below, err on the side of submitting the document. Alternately, contact Martha Crosland of OGC for specific guidance.

- A. **Documents submitted to the Records Processing Center.** The project has procedures to identify documents from OCRWM's Records Information System that qualifies as documentary material. Accordingly, you do not need to produce to the ALS Contractor, or otherwise retain for purposes of derivative discovery, documents that you know for certain have been or will be submitted to the Records Processing Center for production on the Records Information System. This includes OCRWM-controlled documents, a non-exclusive list of which documents is attached to this guidance. Of course, you must continue to submit documents to the Records Processing Center pursuant to project procedures and direction. **NOTE:** Because documentary material from the Records Information System has been submitted to the ALS Contractor, you do not need to retain copies of documents that you print from the Records Information System unless you add relevant marginalia to the document. See section III.B below.

- B. Documents already submitted to the ALS Contractor.** You do not need to submit, or otherwise retain for purposes of derivative discovery, documents that you know for certain that you or someone else has already submitted to the ALS Contractor.
- C. Documents already on the LSN.** You do not need to submit, or otherwise retain for purposes of derivative discovery, documents that you know for certain are already on the LSN, whether as part of the Department's, the NRC's or another participant's document collection.
- D. Preliminary drafts.** Subject to two exceptions, you do not need to submit to the ALS Contractor a preliminary draft of a document even if the document concerns a relevant topic. Likewise, you do not need to submit to the ALS Contractor (or mark as relevant) an email or memorandum merely circulating a preliminary draft for comments. The two exceptions are:
1. **Circulated drafts.** You must submit all "circulated drafts" of documents that when final would qualify as documentary material. A "circulated draft" is a nonfinal document circulated for supervisory signature or concurrence in which the original author or others in the concurrence process have registered a non-concurrence. A "circulated draft" meeting the above criterion includes a draft of a document that becomes a final document and a draft of a document that does not become a final document due to a decision not to finalize the document or the passage of a substantial period of time in which no action has been taken on the document. The mere fact that a preliminary draft is circulated for comments and that comments are provided does not make the preliminary draft a "circulated draft."
 2. **Comments on preliminary drafts.** You must submit all comments on preliminary drafts of documents on relevant topics. This includes comments provided via email, via a separate memorandum, or via handwritten notations on the draft. If the preliminary draft is attached to the comments and can be readily separated--such as an attachment to a paper memorandum--you can submit only the comments and not the draft. However, if the draft cannot be readily separated--which may be the case with attachments to emails--you should nonetheless submit the comments even though the underlying draft being commented on will be included.
- E. Classified information.** DO NOT SUBMIT CLASSIFIED DOCUMENTS TO THE ALS CONTRACTOR. IF YOU POSSESS CLASSIFIED DOCUMENTS THAT YOU BELIEVE ARE RELEVANT, CONTACT CHRIS EINBERG (202-586-8868) OR DIANE QUENELL (702-794-5004) OF OCRWM AND MARTHA CROSLAND (202-586-5793) OF OGC.
- F. Documents regarding other repository sites.** You do not need to submit documents solely regarding other repository sites or sites for a monitored

retrievable storage facility. Such documents are not documentary material or potentially relevant to licensing-related activities for Yucca Mountain and therefore do not need to be submitted or otherwise retained for purposes of derivative discovery unless they contain some express reference to the Yucca Mountain site. Documents in this category include:

1. Documents exclusively related to the Office of the Nuclear Waste Negotiator.
2. Documents exclusively related to activities to select a monitored retrievable storage facility site.
3. Documents exclusively related to site suitability of other potential repository sites.

G. Documents about the LSN. You do not need to submit, or otherwise retain for purposes of derivative discovery, documents that concern the LSN. This includes the following types of documents:

- a. This guidance and the May 5, 2003 Call Memoranda.
- b. Training material regarding the identification of documentary material.
- c. Documents regarding the schedule, cost, or staffing of document review or production.

Documents about the LSN and the effort to collect documents for production on the LSN do not satisfy the definition of "documentary material" and are not required to be produced in the LSN.

H. Express regulatory exclusions. The following types of documents are excluded from the LSN by NRC regulation. Therefore, you do not need to submit them even if their content may otherwise seem relevant.

1. Official notice materials (e.g., Federal Register materials, DOE Orders, statutes, regulations, court filings, transcripts of public hearings). You do not need to submit these kinds of documents even if they are cited in the License Application or technical work product.
2. Reference books and text books.
3. Material pertaining exclusively to administrative matters. For example, material exclusively related to budgets, financial management, personnel, office space, and general distribution memoranda.
4. Press clippings and press releases.

5. Junk mail.
 6. References cited in contractor reports that are readily available (*e.g.*, NRC Regulatory Guides, Nuclear Waste Technical Review Board publications).
 7. Readily available references, such as journal articles and proceedings, which may be subject to copyright.
 8. Congressional correspondence (*e.g.*, letters and emails to or from U.S. Senators or Representatives, or their staffs).
- I. **Procurement documents.** You do not need to submit documents concerning procurement except for documents constituting the scope of work on procurement related to:
- a. repository siting;
 - b. construction or operation of the repository; or
 - c. the transportation of spent nuclear fuel or high-level waste.
- J. **Offsite transportation.** You do not need to submit documents concerning the offsite transportation of spent fuel or high-level radioactive waste unless the document has a bearing on the licensing of the Yucca Mountain repository (*e.g.*, cask certification documentation).
- K. **Other documents with no potential bearing on the Yucca Mountain license application.** You do not need to submit to the ALS Contractor, or otherwise retain for purposes of derivative discovery, any other documents that have no potential bearing on the licensing application for the Yucca Mountain repository. Examples of such documents include:
1. Documents solely concerning the date, time and location of meetings.
 2. Documents about security clearances.
 3. Documents concerning the issuance of personal safety equipment (*e.g.*, safety glasses, safety shoes).
 4. Payroll documents and other documents concerning salaries.

SPECIAL NOTE REGARDING EMAILS: Your obligation to identify and submit LSN-relevant documents applies to emails that you send or receive. This includes emails between an employee of one national laboratory and a co-employee as well as emails among employees of different national laboratories. It also includes emails among contractor and/or subcontractor employees. This obligation extends to all email systems that you might use. **NOTE:** The standard for relevance of emails is the same as for other documents.

In determining whether an email should be submitted, you must consider the entirety of the message chain within the email. If any message in the chain is LSN-relevant, you must treat the entire email as relevant. The obligation to retain documents for derivative discovery also applies to emails.

For users of the OCRWM Lotus Notes email system, there is an electronic template that requires you to identify whether emails you send or receive from external sources are LSN relevant. Backup tapes are retained of all emails sent or received. Your use of this template satisfies your obligations with respect to emails on the OCRWM Lotus Notes email system.

For users of other email systems, you must determine whether an email that you send or receive via that system qualifies as a document that needs to be submitted to the ALS Contractor. You can submit qualifying emails in one of two ways. You can print a copy of such emails when you send or receive them, and submit the paper copies to the RPC where applicable or the ALS Contractor each month. Alternatively, you can copy the emails to a folder on the email system and provide them on a CD-ROM for submission. Also, for emails that you determine should not be submitted but need to be retained for potential derivative discovery, you should store this email in a manner that can be readily retrieved. **NOTE:** There is one exception to the foregoing for emails on non-OCRWM Lotus Notes systems. If you receive an email that you are certain was sent from the OCRWM Lotus Notes email system, you do not need to submit the email from your system even if LSN-relevant. That is because the template on the OCRWM Lotus Notes email system required the sender to categorize the email. Of course, if you forward the email, without or without comments, you have created a new email that must be submitted if LSN-relevant.

III. DOCUMENTS THAT DO NOT NEED TO BE SUBMITTED BUT THAT MUST BE RETAINED FOR DERIVATIVE DISCOVERY.

Under NRC regulations, certain documents are not required to be included in the LSN; however, these documents may be subject to discovery in connection with depositions, *i.e.*, "derivative discovery," or required to be maintained for other purposes. This type of document is described below, and should be segregated and retained for possible collection at a later time. **NOTE:** You do **not** have to retain multiple copies of these documents. It is sufficient to retain only one copy. You also do **not** need to retain a copy of documents that you have printed from the Records Information System (unless you have added relevant marginalia to the copy).

- A. Preliminary drafts not submitted to Records Processing Center.** You must retain a copy of all preliminary drafts of documents that potentially qualify as documentary material, if not previously submitted to the Records Processing Center for inclusion on the Records Information System. A preliminary draft means any non-final document that is not a "circulated" draft, as defined in section II.D above.
- B. Relevant marginalia.** You must retain a copy of all documents that otherwise do not have to be submitted, but that contain marginalia that are potentially relevant

to licensing-related activities. "Marginalia" means handwritten, printed, or other types of notations added to a document excluding underlining and highlighting.

- C. **Personal records.** You must retain a copy of all personal records that are potentially relevant to licensing-related activities unless previously submitted to the RPC. "Personal record" includes a document in your possession that was not required to be created or retained by you and that could otherwise be retained or discarded at your sole discretion. You do not need to retain documents solely concerning irrelevant personal matters, such as vacation planning, invitations to parties, lunch plans, treatment for a personal medical condition or personal finances.
- D. **Travel vouchers.** You must retain travel vouchers for all travel having any relationship to the Yucca Mountain repository unless previously submitted to the RPC.
- E. **Speeches.** You must retain speeches having any relationship to the Yucca Mountain repository, including the text of such speeches, power point presentations used in conjunction with such speeches, outlines of such speeches, and handouts distributed in conjunction with such speeches.
- F. **Other offsite transportation documents.** You must retain documents related to off-site transportation activities that are not required to be submitted. *See* section II.J above.
- G. **Other storage, management and treatment documents.** For non-OCRWM personnel, you must retain documents that relate to the storage, management, or treatment of DOE spent nuclear fuel, high-level radioactive waste or Naval Reactor spent nuclear fuel. Although the information your office presently possesses is not required to be processed for the LSN, it is critical that your office continue to retain such documentation for purposes of future waste acceptance and disposal at a Yucca Mountain repository. This information may be required at the time of shipment to verify that the waste meets OCRWM waste acceptance criteria for disposal in the repository.

IV. TREATMENT OF PRIVILEGED DOCUMENTS

If you create a document that is privileged, you should denote at the top of each page of the document that the document is privileged, ideally denoting which privilege applies (*e.g.*, attorney-client communication; deliberative process, privacy, business-proprietary, see list of privileges in Section IV.A-G). Likewise, if you send a privileged email, you should denote at the beginning of the email that it is privileged. (Documents marked as privileged are reviewed before submittal on the LSN. By adding such a legend on a document or email, you will call out the document or email for review.)

Further, when you submit documents, you should segregate all potentially privileged documents in the shipment and denote them as potentially privileged on the LSN Privileged Document

Shipping Form, a copy of which is attached. You also should indicate on the form which category of privilege you believe applies to the document. You can group together documents with similar privileges. NOTE: This direction does not relieve records sources of the records requirements to submit project records to the RPC.

The following guidance is provided to help you identify potentially privileged documents. If you are uncertain whether a document is privileged, you should mark it as privileged (because documents so marked will be reviewed by counsel to validate the privilege determination prior to production on the LSN). Also, you should treat as privileged all documents that you receive that have been marked or stamped by someone else as privileged, or that otherwise state that they are privileged. Again, all documents that you submit to as privileged will be reviewed to validate the designation.

A. **Attorney-client communications.** This privilege protects confidential communications (whether oral, paper or electronic) to or from a lawyer for the purpose of providing legal advice, as well as documents that relay or otherwise discuss an attorney's advice. Examples of documents that qualify as privileged attorney-client communications include the following:

1. **Comments from an attorney on the draft License Application.** This includes (i) formal written comments on a draft LA section; (ii) comments relayed in an email; (iii) interlinear handwritten comments by an attorney on a draft; and (iv) notes made that record oral comments from an attorney.
2. **Documents authored by attorneys.** You should treat as privileged all documents that you receive that are authored by a lawyer, including emails, unless it is **clear** that (i) the document was sent outside the Yucca Mountain project or (ii) the document contains **no** substantive information, such as an email that merely states the date and time of a meeting.
3. **Documents that you send to an attorney.** You should treat as privileged all documents, including emails, that you send to an attorney for purposes of seeking that attorney's advice, unless (i) the document was sent outside the Yucca Mountain project; or (ii) the document contains **no** substantive information, such as an email that merely states the date and time of a meeting. **NOTE:** A document is not a privileged attorney-client communication merely because an attorney happens to be on the distribution list. The document must be sent to the attorney for the specific purpose of seeking legal advice. Consequently, a document that you routinely create in the course of your job and regularly distribute for informational purposes or for comments by a number of individuals including an attorney is not a privileged attorney-client communication even if an attorney is on the distribution list. **NOTE:** You cannot make a document privileged merely by sending it to an attorney. You must have created the document for the purpose of seeking legal advice. Of course, an attorney's confidential comments about a nonprivileged document are protected even if the underlying document itself is not privileged.

4. **Documents that forward another document authored by an attorney.** If you send to someone else on the project a privileged memo, email or other document prepared by an attorney, such as an attorney's comments on the draft License Application, you should mark the forwarding memo or email as privileged. **NOTE:** When you forward an email or reply to an email, pay particular attention to all emails in the preceding chain, including attachments. If any of them are privileged and have not been sent to third parties, you should mark your forwarding email or reply as privileged.
5. **Documents that discuss what an attorney said.** The attorney-client privilege extends to documents that relay or discuss an attorney's advice. If you send an email or other document to someone else on the project that discusses what a lawyer said, you should treat your document as privileged.
6. **Documents created for the purpose of seeking legal advice.** You should treat as privileged documents that you create for the purpose of seeking legal advice. **NOTE:** A document created for another purpose does not become privileged merely because it is sent to an attorney. What you and an attorney discuss about the document may be privileged, but the underlying document itself will not become privileged just because you sent it to an attorney.

B. Litigation work product. This privilege protects confidential documents prepared in anticipation of litigation. **NOTE:** If you think that a task might be eligible to qualify as litigation work product, consult with an attorney in advance before undertaking the work or asking someone else to do so. Technical, engineering and scientific analysis and reports prepared by or for the Yucca Mountain project in the normal course of business, including those prepared in support of the License Application, such as AMRs and SDDs, should not be marked as litigation work product.

Examples of protected litigation work product include:

1. **The draft License Application.** The draft License Application, which is being prepared for purposes of litigation before the NRC and is analogous to the complaint in a lawsuit, should be marked as privileged litigation work product. This includes all draft chapters and sections of the draft License Application, including the draft SAR. Because these are also preliminary drafts they do not need to be submitted to the ALS Contractor for inclusion on the LSN unless they qualify as circulated drafts. See section II.D above. **NOTE:** Some of the draft License Application chapters have been marked solely as predecisional. While the drafts may qualify as predecisional for purposes of FOIA, you should also mark them as litigation work product. **NOTE:** Drafts of technical work product that support the License Application, such as draft AMRs and SDDs, should not be marked as litigation work product. (Of course, an attorney's comments on draft

technical documents would still qualify as privileged attorney-client communications).

2. **Non-attorney comments on draft License Application.** Comments by non-attorneys on the draft License Application should be marked as litigation work product since they are comments on a litigation work product, and if sent to an attorney for the purpose of seeking legal advice, as an attorney-client communication as well.
3. **Documents prepared at request of counsel to assist with litigation.** Documents prepared at an attorney's request to help prepare for the license proceeding should be marked as litigation work product. This includes emails and other communications among the non-lawyers working to develop the information to respond to counsel. If you ask someone on the project to do some work in order to respond to a request by counsel, you should advise that person that requested work is litigation work product and should be marked as such. **NOTE:** Do not mark as litigation work product work that you perform on technical work product such as AMRs and SDDs even if the reason for the work was direction from counsel.
4. **Other documents prepared by a representative of the Department in connection with or in anticipation of litigation.** Pursuant to NRC regulation, litigation work product does not need to be prepared by or at the direction of an attorney to be protected. Any work prepared in anticipation of litigation by a party, a party's agent or other representative is protected. White papers, position papers or other issue papers that address legislative, regulatory, or other legal issues (e.g., in some way discusses the regulations or takes a position based on the regulations and is not a research paper that purely examines scientific data or issues). This privilege does not cover material that you prepare in the normal course of your job, such as work in support of the License Application. If you are unsure whether a document is covered by this privilege, consult with an attorney. **Note:** Some people have marked documents as "attorney work product" as opposed to "litigation work product." It is preferable to use the term "attorney work product" when you are preparing a document for or at the request of an attorney, and the term "litigation work product" for other work prepared in anticipation of litigation. What is most important, however, is that that you mark qualifying documents with one of these terms and not just as "work product." The electronic searches for potentially privileged documents do not pick up the simple term "work product."

- C. **Predecisional, deliberative process.** This privilege protects the decision-making process of government agencies and encourages the frank discussion of legal and policy issues by ensuring that agencies are not forced to operate in a fish bowl. Traditionally, there are two fundamental requirements that must be met to invoke the deliberative process privilege. The document must be: (1) predecisional (*i.e.*, it precedes the adoption of an agency policy), and (2) deliberative (*i.e.*, a direct

part of the decision-making process in that it makes recommendations or expresses opinions on legal or policy matters). Federal courts have stated that this privilege must be "construed as narrowly as consistent with efficient Government operation."

1. **Predecisional requirement.** You should consider the following factors in deciding whether a document is predecisional:
 - a. **Predates decision.** A document must predate the making of a final decision on the topic that is the subject of the document. As a result, a final, signed decision memorandum is not predecisional. Also, documents generated to implement a final decision are not predecisional. **NOTE:** If a decision maker attaches or incorporates by reference a predecisional document in a final decision memorandum, the predecisional document loses its privileged status.
 - b. **Prepared to assist in the decision-making process.** A document must have been prepared to aid in the making of a decision. Generally speaking, the agency must be able to show that the document was prepared for and played a role in helping an agency consider a particular decision. Generally speaking, the document must have been prepared for or at the request of management for the purpose of assisting make a policy decision.
 - c. **No final decision is necessary.** It is not necessary for the agency to have made a final decision in order to protect the documents created to aid the agency in the decision-making process. As the Supreme Court has held, "Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions"
 - d. **Discussions of recommendations not accepted are protected.** Documents that discuss a predecisional recommendation that was not adopted are protected.
 - e. **Both inter- and intra-agency decisions are protected.** The privilege applies to internal discussions within an agency as well as discussions among agencies. Thus, DOE communications with other federal departments and agencies that relate to a decision that another department or agency is considering can be protected. **NOTE:** We do not intend to claim predecisional privilege with respect to communications with the NRC directly about the License Application and its docketability. Communications with the NRC about potential rulemaking, however, would be protected.

- f. **Form does not matter.** While DOE has a format for formal decisional memoranda, the privilege is not limited to documents in that form. Any document, including emails, can qualify as a predecisional document if it satisfies the substantive requirements for the privilege.
- 2. **Deliberative requirement.** You should consider the following factors in deciding whether a document is deliberative:
 - a. **Advice, opinions, and recommendations are protected.** Generally, to be “deliberative” a document must reflect the “give and take” during the decision-making process and contain opinions, recommendations, or advice about agency policies. Some courts have examined this issue as whether disclosure of such frank discussions would tend to chill the free consideration and expression of opinions within an agency’s decision-making process. Types of documents that might qualify as deliberative include advisory opinions, recommendations, and decisional memoranda.
 - b. **Purely factual information not protected.** Generally speaking, material that is purely factual in nature, as opposed to expressing opinions, recommendations, pros and cons, etc., is not protected. Nevertheless, factual material may be withheld under two circumstances: (1) the author of a document deliberately selects specific facts out of a larger group of facts (for example, separating significant facts from insignificant facts could constitute an exercise of judgment by agency personnel); and (2) the factual information is so inextricably connected to the deliberative material that its disclosure would expose the agency’s deliberations. For example, if a memorandum sets forth the facts on which the author bases a recommendation. **NOTE:** We do not intend to claim privilege in the License Application proceeding on comments on drafts of technical work product like AMRs as opposed to the License Application itself. Such documents should not be marked as predecisional for these purposes.
- D. **Privacy privilege.** Documents that contain personal information such as financial or medical information the disclosure of which would constitute an unwarranted invasion of privacy should be marked as privacy privileged. Examples are documents that contain social security numbers, bank account numbers or other personal identifiers.
- E. **Business-proprietary privilege.** This privilege protects private businesses and does not apply to protect information about DOE. Documents are proprietary privileged if they contain confidential trade secrets or confidential commercial or

financial information that, if released to the public, would harm that company in the competitive marketplace, including the following types of information:

1. Specific information about a contractor's business process, budget (*e.g.*, cost and prices), staffing for projects, undisclosed intellectual property, or bids.
2. Specific labor rates, administrative costs, or overhead.

F. Homeland Security (HSC) privilege. Documents not otherwise classified as National Security Information or Restricted Data, but containing Sensitive Unclassified (SU) information should be marked as SU privileged. SU includes Official Use Only (OUO) and Safeguards Information (SGI) as defined by the associated Classification Guide, and any other SGI, Unclassified Nuclear Controlled Information (UCNI) or information not releasable to the public for security concerns.

G. Archeological Privilege. Documents that contain information that is protected by the National Historic Preservation Act (16 U.S.C 407) or the Archeological Resources Protection Act (16 U.S.C 470aa) such as the locations of archeologically sensitive areas should be marked as archeological privileged..

* * *

If you have any questions regarding this memorandum and its requirements, please contact Martha Crosland at (202) 586-5793 with the Office of General Counsel.

Attachments

Distribution

Office of the Secretary
Office of the Deputy Secretary
Office of the Under Secretary
Administrator, National Nuclear Security Administration
Director, Office of Civilian Radioactive Waste Management
Director, Office of Nuclear Energy, Science and Technology
Executive Director, Office of the Secretary of Energy Advisory Board
Assistant Secretary for Energy Efficiency and Renewable Energy
Assistant Secretary for Environmental Management
Director of Management, Budget and Evaluation/Chief Financial Officer
Assistant Secretary for Environment, Safety and Health
Assistant Secretary for Congressional and Intergovernmental Affairs
Assistant Secretary for Policy and International Affairs
Director of Public Affairs
Director, Office of Science
Director, Office of Security and Safety Performance Assurance
Office of Inspector General
Director, Office of the Executive Secretariat
Administrator, Energy Information Administration
Director, Office of Independent Oversight and Performance

cc:

Deputy Administrator for Naval Reactors
Manager, Sandia Site Office
Manager, Albuquerque Site Office
Manager, Livermore Site Office
Manager, Los Alamos Site Office
Manager, Nevada Site Office
Manager, Chicago Operations Office
Manager, Idaho Operations Office
Manager, Oak Ridge Operations Office
Manager, Oakland Operations Office
Manager, Ohio Field Office
Manager, Richland Operations Office
Manager, Savannah River Operations Office
Manager, Office of River Protection

Non-exclusive List of OCRWM Documents

Document Title and Date

- Yucca Mountain Site Characterization Plan (1988)
- Viability Assessment of a Repository at Yucca Mountain (1998)
- Yucca Mountain Preliminary Site Suitability Evaluation (2001)
- Yucca Mountain Site Suitability Evaluation (2002)
- Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982 (2002)
- Draft Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nevada (1999)
- Supplemental Draft Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (2001)
- Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (2002)
- Yucca Mountain Science and Engineering Report (2001)
- Yucca Mountain Science and Engineering Report, Revision 1 (2002)
- Site Recommendation Comment Summary Document

Non-exclusive List of OCRWM-Contractor Documents

Document Title and Date

- Total System Performance Assessment for the Site Recommendation (CRWMS M&O 2000)
- Total System Performance Assessment for the Viability Assessment (1998)
- Yucca Mountain Site Description (CRWMS M&O 2000)
- Integrated Site Process Model Report (CRWMS M&O 2000)
- Near Field Environment Process Model Report (CRWMS M&O 2000)
- Engineered Barrier System Degradation, Flow and Transport Process Model Report (CRWMS 2000)
- Waste Package Degradation Process Model Report (CRWMS 2000)
- Waste Form Degradation Process Model Report (CRWMS 2000)
- Saturated Zone Flow and Transport Process Model Report (CRWMS 2000)
- Biosphere Process Model Report (CRWMS 2000)
- Disruptive Events Process Model Report (CRWMS 2000)
- FY01 Supplemental Science and Performance Analyses, Volume 1: Scientific Basis and Analyses (BSC 2001)
- FY01 Supplemental Science and Performance Analyses, Volume 2: Performance Analyses (BSC 2001)
- Preliminary Preclosure Safety Assessment for Monitored Geologic Repository Site Recommendation (BSC 2001)
- Technical Update Impact Letter Report (BSC 2001)

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